No. 12154

In the United States Court of Appeals for the Ninth Circuit

WILLIAM R. MCCOMB, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

ROW RIVER LUMBER COMPANY, A CORPORATION, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

BRIEF FOR APPELLANT

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STATEMENT OF JURISDICTION

This action was instituted by the Administrator of the Wage and Hour Division, United States Department of Labor, under Section 17 of the Fair Labor Standards Act of 1938,[1] to enjoin defendant from violating the record-keeping, overtime, and shipment provisions of the Act (R. 2–6). That section expressly confers jurisdiction on the district courts of the United States to restrain the alleged violations of the Act.[2]

[1] C. 676, 52 Stat. 1060, 29 U. S. C., sec. 201 et seq., hereinafter called "the Act."

[2] Section 17 provides in pertinent part: "The district courts of the United States * * * shall have jurisdiction, for cause

After a trial of the issues, the District Court of the United States for the District of Oregon entered a judgment denying the injunction and dismissing the complaint (R. 15–16). This Court has jurisdiction to review the judgment below under Title 28, United States Code, sections 1291 and 1294 (1).

STATEMENT OF THE CASE

Except for certain modifications indicated in the summary below, appellant agrees in substance with the district court's findings of fact (R. 9–14). Briefly summarized, the facts are as follows:

The appellee, an Oregon corporation with its principal office in Portland, Oregon, is engaged in the production of lumber at a sawmill and planing mill located about thirteen miles from Cottage Grove, Oregon (fdg. 2, R. 10). The appellee's mills, mill office, mill pond, loading dock and railroad tracks, bunkhouse and cookhouse are located on a 35-acre tract of land owned by the appellee (fdg. 3, R. 10).

The cookhouse, originally a bunkhouse which was remodelled by appellee in the latter part of 1942 (fdg. No. 4, R. 10), is located approximately 150 feet from the mills (R. 62).[3] It consists of a kitchen, store room, dining room and living quarters for the

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shown, * * * to restrain violations of Section 15." Section 15 prohibits the violations here alleged.

[3] The appellee originally spent $1,986.88 for labor and material to remodel the building subsequently used as a cookhouse; in addition, appellee spent $416.95 in 1946 to add a wing as living quarters for the cook's helper, and in 1947 expended $312.33 to improve the ventilation of the building (R. 168 and Interrog. VIII, XV, and XVI, R. 43, 44, 48, 49).

cook and her family and for the kitchen helper (R. 37).[4] Appellee not only owns the cookhouse but has borne the entire cost of its maintenance and repair and of the furnishing and replacement of cooking, eating, and culinary facilities and equipment (fdg. 4, R. 10).[5] The appellee, moreover, expends several hundreds of dollars annually to furnish the water, fuel and electricity necessary for the operation of the cookhouse (Interrog. XVII, 10, 11, R. 44, 45, 49, fdg. 4), and, in short, furnishes "everything but the food and labor." (R. 164).

Since it was originally opened in 1942, the cookhouse has been in uninterrupted use, and, with very few exceptions, it has been open seven days a week to feed appellee's employees (R. 65–66, 133). Except for the public eating places in Cottage Grove, thirteen miles away, there is no other public eating place available for the employees of the Row River Lumber Company (R. 65), and the employees who live at the bunkhouse would be unable to work at the mill if they were not able to get their meals at the cookhouse (fdg. 14, R. 13, 14). In addition, the cook also prepares box lunches for the woods crew and serves lunch at the

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[4] The lodging furnished free to the cook and the kitchen helper was valued in 1947 at $360 for the cook and at $120 for the helper (Interrog. XVIII, XIX, R. 45, 49).

[5] The original cost of the equipment furnished by the appellee was $72.93 (Interrog. X, XI, R. 43, 48); in addition, equipment owned by one of appellee's officers was also furnished (R. 204, 205). Appellee further spent $129.34 in 1946 and $887.87 in 1947 to replace or repair cookhouse equipment (Interrog. XII, XIV, R. 43, 44, 48).

cookhouse to some employees who work at the mill-site but who live off the premises (R. 66, 143).

The personnel operating the cookhouse has consisted, at all times since its inception, of only two persons, a cook and a cook's helper (R. 121, 176, 177). The cooks who have worked there since 1942 simply agreed orally with one or another of the company's officials to operate the cookhouse in a satisfactory manner (R. 73, 211). "The cook is retained under an oral agreement which has no definite time to run and can be ended by either party without notice" (fdg. 5, R. 11). It was the cook's duty "to furnish meals to all the employees who chose to eat at the cookhouse" (R. 119) and in the performance of this duty she was required to work "regularly and steadily every day" (R. 145) a total of about 73 hours a week (fdg. 18, R. 14). The cook herself devotes her full time to working for appellee. While thus engaged she does not hold herself out to other mills as being in the market to cook for them (fdg. 10, R. 12).

Though the court below found that "The cook's duties require special aptitude and considerable managerial skill" (fdg. 14, R. 13), the undisputed evidence is that the cook had no responsibilities of management other than merely purchasing and cooking the food (R. 101), to produce plain meals (R. 90–91), which require only the knowledge ordinarily acquired by a cook or housewife in a home kitchen (R. 110, 177). The incumbent at the time this suit was instituted was just a "fair" cook who like many household cooks assumed the task of personally buying as

well as cooking the food (R. 121). The work of her one assistant is confined to making toast, peeling potatoes, setting tables, carrying food to tables after it is dished up, doing the dining room work, and washing dishes (R. 122).

Even though the nature of the cook's work required little supervision, the mill superintendent had the authority to issue instructions and exercise supervision with respect to the cook's activities and "If [he] had a cook at the cookhouse who did require instructions and supervision * * * [he] would * * * exercise that supervision and give her the instructions [he] thought necessary" (R. 77, 78). Thus, as one of the cooks stated, "the cookhouse and dining room must be operated to the satisfaction of [appellee's officials]" and "if the meals * * * serve[d] were not satisfactory * * * they could terminate [her] services" (R. 127, 130). Accordingly, the mill superintendent ate at the cookhouse an average of one meal a week, and made "it a point to observe the condition of the cookhouse and to see how things are being operated there" (R. 88–89). And, although generally its operation has been satisfactory, the mill superintendent has taken corrective action when it was deemed necessary (R. 75, 76). Moreover, the company has also participated in the management and operation of the cookhouse. During the war, appellee on its own initiative successfully applied for additional ration points to provide more food for its logging crew (R. 191, 194, 220); in addition, when it was difficult to purchase food in the vicinity of the mill-site, appellee helped the cook to

buy it in Portland (R. 123–126, 228–229). For the purchase of cookhouse supplies and equipment, the cook was authorized by the company to make expenditures for which she was reimbursed, or to make binding commitments for payment by the company (fdg. 15, R. 13). Further, on one occasion when a cook became ill, the company hired and paid a cook's helper to assist the substitute cook (fdg. 15, R. 13); appellee, moreover, withheld part of the helper's wages for income tax purposes, and held up the helper's check until she acquired a social security card (R. 189).

The cook was not paid a salary or either straight time or overtime wages by the appellee. Instead, appellee's employees who ate at the cookhouse had deducted from their wages a fixed amount (40 to 60 cents) for each meal eaten (fdg. 7, R. 11). In addition, appellee paid the cook a subsidy of from 10 to 15 cents out of its own funds for each meal served (fdg. 7, R. 11). At the end of each month the cook turns in to the mill office the number of meal tickets which correspond to the number of meals served, and appellee's Portland office, where the tickets are sent, prepares and forwards a check and itemized statement to the cook (R. 39, 82, 122–123, 155). The subsidy is also paid on meals served employees of appellee's independent contractors (R. 232–233). The subsidy was utilized by appellee as a means of attracting manpower from Cottage Grove, where there were competing mills, by offering inexpensive meals to employees, and, also, to absorb part of the cook's expense

of running the cookhouse so that "she could make something" (R. 207, fdg. 8, R. 11–12). In 1947 the subsidy accounted for 96.3 percent of the cook's net earnings (fdg. 13, R. 13). The "final determination" that increases in the price per meal could be instituted was made by appellee, and the cook never deviates from the price thus set (fdg. 9, R. 12).

Upon these facts, the district court concluded that both the cook and her helper were engaged in the production of goods for interstate commerce, that the cook was an employee of the appellee within the meaning of the Fair Labor Standards Act, and that appellee has not kept the records of the cook required by the Act and regulations. The complaint was dismissed, however, on the grounds that the cook was exempt from the overtime provisions of the Act as "an executive and administrative" employee, and that the helper was not an employee of the appellee (concls. of law, R. 14–15). The conclusion that the cook was an "executive or administrative" employee apparently was predicated on the district court's belief that simply "by an exercise in semantics"—"merely by designating as salary what is now called profit, the defendant could put the cookhouse manager beyond the purview of the Act, as an executive or administrative employee" (R. 8). No reason was given by the court for its conclusion that the cook's helper was not appellee's employee.

QUESTION PRESENTED

1. Whether the cook for appellee's cookhouse is an executive or administrative employee within Section

13 (a) (1) of the Fair Labor Standards Act as those terms have been defined and delimited by the Administrator.

2. Whether a cook's helper, hired and paid by appellee's cook with appellee's acquiescence, is an "employee" of appellee within the meaning of the Act.

SPECIFICATION OF ERRORS

1. The court below erred in holding that the cook was exempt as an executive and administrative employee under Section 13 (a) (1) of the Act.

2. The court below erred in holding that the cook's helper was not an employee of appellee within the meaning of the Act.

3. The court below erred in failing to grant an injunction and in dismissing the complaint.

SUMMARY OF ARGUMENT

I

The district court's conclusion of law that the cook was an "executive" or "administrative" employee cannot be sustained on this record. As the burden of pleading this exemption lies with the employer, the court below erred in concluding that the exemption applied when no issue as to it was raised by the pleadings and the trial was not conducted with reference to it (*Schmidke* v. *Conesa,* 141 F. (2d) 634 (C. A. 1)). As the burden of proving the facts on which exemption depends also rested on the defendant (*Walling* v. *General Industries,* 330 U. S. 545, 548), it was error to conclude that the cook was exempt without first making findings of fact as to all of the requirements for

exemption prescribed in the applicable regulations (29 C. F. R. Cum. Supp. Sec. 541.1 and 541.2) issued pursuant to Section 13 (a) (1) of the Act. The evidence in the record bearing on the point, far from meeting the burden of proof, affirmatively shows that the cook's duties do not satisfy the requirements of at least four of the conditions of the regulations defining the "executive" capacity, nor any of the requirements of the regulations defining the "administrative" capacity.

II

The cook's helper is unquestionably an "employee" within the contemplation of the Act and the only question is whether the responsibility for her working standards rests upon the proprietor of the business or solely upon the cook. It would seem to follow, *a fortiori,* from the finding that the cook is appellee's employee, that appellee is also the employer of the cook's helper. Clearly the cook, in hiring the helper, was acting "directly * * * in the interest of" her employer within the literal terms of the definition of "employer" in Section 3 (d) of the Act.

The Supreme Court's decision in *McComb* v. *Rutherford Food Corp.,* 331 U. S. 722, is controlling here and conclusively establishes appellee's responsibility as the employer of the cook's helper as well as of the cook. The *Rutherford* case establishes that an employer cannot escape responsibility under the Act by interposing an intermediary to whom the authority to hire and fire and pay wages is delegated. Many of the circuit courts of appeals, applying the principles of the

Rutherford case, have concluded, on the basis of employment relations comparable to the conditions of the instant case, that the responsibility for maintaining the statutory labor standards rests upon the owner or operator of the business and cannot be delegated to an intermediary or middleman.

ARGUMENT

I

Appellee's cook is not an executive or administrative employee within the exemption provided by Section 13 (a) (1) of the Act

The district court's findings and conclusions that the cook is an employee of appellee (concl. of law 2, R. 14) who is engaged in the production of goods for interstate commerce [6] (concl. of law 3, R. 14) and that she works about 73 hours per week without extra compensation for overtime for that part of her work in excess of 40 hours per week (fdg. 18, R. 14), require the conclusion that appellee is in violation of Section

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[6] Section 3 (j) provides that "* * * for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed * * * in any process or occupation necessary to the production thereof * * *." That cookhouse employees such as these come within the phrase was decided by this Court in *Consolidated Timber Co.* v. *Womack*, 132 F. (2d) 101.

As the district court also found that "substantially all" of such goods are "sold and shipped in interstate commerce" (fdg. 2, R. 10), this practice also resulted in violation of Section 15 (a) (1) which provides that "* * * it shall be unlawful for any person—(1) to * * * ship * * * or sell * * * in commerce * * * any goods in the production of which any employee was employed in violation of * * * Section 7 * * *."

7 and should be enjoined under Section 17, unless the district court's conclusion that the cook was exempt as an executive and administrative employee within Section 13 (a) (1) can be sustained. The latter conclusion is plainly untenable.

Section 13 (a) (1) provides that "The provisions of Sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, [or] administrative * * * capacity * * * (as such terms are defined and delimited by regulations of the Administrator)." Pursuant to this authority, the Administrator has issued appropriate regulations defining and delimiting these terms. These are set out in the Appendix, *infra,* pp. 30–31.

As Section 13 (a) (1) creates a special exception or exemption to the general requirement of Section 7, the burden was on defendant to plead it affirmatively. It appears, however, that there is no mention of this exemption in the pleadings, or even in the statements of counsel, nor was any reference made to the exemption in the testimony of witnesses or in the remarks of the court during the trial. There was no suggestion of any intent to assert this defense (R. 2–8, 28–234). The trial was concerned solely with the issue raised by the answer—whether the cook and her helper were employees of appellee. The Administrator, therefore, had no reason to produce evidence on the question of exemption or to examine the witnesses concerning that possibility. Not until the memorandum opinion of the district court was filed, subsequent to the trial (R. 8–9), was any suggestion made that such a defense might be claimed or held

applicable. The law in this situation is best summarized in *Schmidke* v. *Conesa,* 141 F. (2d) 634 (C. A. 1), where, as in this case, no issue on the Section 13 (a) (1) exemption was framed by the pleadings, and the trial was not conducted with reference to any such issue. The court of appeals vacated the judgment of the district court, which had dismissed the complaint on a finding that plaintiff was exempt under Section 13 (a) (1), stating its reasons as follows:

> Since the Act is in its nature remedial, its exemptions are to be strictly construed and one claiming their benefit must bring his case within both their letter and spirit. *Bowie* v. *Gonzales,* 1 Cir., 117 F. 2d 11, 16. From this and also according to ordinary principles of pleading it follows that a plaintiff, in order to state a cause of action under the Act, is not required to allege that its exemptions are inapplicable. *Stratton* v. *Farmers Produce Co.,* 8 Cir., 134 F. 2d 825, 827. Exemption is a matter of defense which must be alleged as a special defense under Rule 8 (c), Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, and this the defendant did not even attempt to do. [141 F. (2d) at 635.]

The error of the court below in this respect is not remedied by the addition of the statement "The pleadings and pre-trial order may be deemed amended accordingly" to the district court's conclusion of law No. 5 (R. 15) holding the cook exempt. Rule 15 (b) of the Federal Rules of Civil Procedure authorizes such amendments only "When issues not raised by

the pleadings are tried by express or implied consent of the parties." This condition plainly did not exist in this case for no issue of exemption under Section 13 (a) (1) was tried, and as appellant's counsel was in no way advised of the existence of any such issue, he cannot be considered to have consented to such a trial.

In any event, neither the evidence introduced in the trial of the employment issue which happens fortuitously to relate also to the conditions on which the exemption depends, nor the findings of fact made by the district court, support the conclusion that "The cook is an executive and administrative employee as defined in the regulations" (R. 15). It is now too well settled to require argument that the employer has "the burden of proving the existence of these conditions, if it would rely on its defense" of exemption under Section 13 (a) (1) (*Walling* v. *General Industries Co.,* 330 U. S. 545, 548; *Lassiter* v. *Guy F. Atkinson,* 162 F. (2d) 774 (C. A. 9)).[7] The court below was not free to reach the conclusion of law that the cook was exempt, therefore, until it made findings of fact establishing the existence of each of the conditions for exemption required by the regulations. This, the court did not, and on the evidence in the record could not, do.

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[7] Also in point and to the same effect are *Helliwell* v. *Haberman*, 140 F. (2d) 833 (C. A. 2); *Fanelli* v. *United States Gypsum Co.*, 141 F. (2d) 216 (C. A. 2); *Smith* v. *Porter*, 143 F. (2d) 292 (C. A. 8); *Walling* v. *Reid*, 139 F. (2d) 323 (C. A. 8); *George Lawley & Son Corp.* v. *South*, 140 F. (2d) 439 (C. A. 1), certiorari denied 322 U. S. 746.

On the contrary, such relevant evidence as was introduced affirmatively shows that many of the requirements for exemption were not met.[8] It is at once apparent that the cook cannot qualify under the "executive" exemption because she was not employed on a "salary basis" as required by Section 541.1 (A) of the regulation, nor can the cook qualify under the "administrative" exemption because she was not employed on a "salary or fee basis" as required by Section 541.2 (A). The cook's entire cash payment for her employment was the surplus or "profit," if any, remaining from the meal price paid by those who ate at the cookhouse, as supplemented by the subsidy paid by appellee after the cost of the groceries used and the cash wage of the helper were deducted (R. 105). Obviously, under these circumstances the cook's wage from her employment is subject to variation not only with the price of groceries, but also with the number of meals served. Such payments plainly do not constitute a "salary" or a "fee" within natural and ordinary meaning of those terms. Nor could they become a salary "merely by designating" them as such—"by an exercise in semantics"—as assumed by the court below. "Salary" connotes "a fixed annual or periodical payment for services depending upon the time and not upon the amount of services ren-

[8] It is well settled that where the conditions of the regulations are phrased in the conjunctive, all of them must be met in order for the exemption to apply. *George Lawley & Son Corp.* v. *South*, *Fanelli* v. *United States Gypsum Co.*, and *Smith* v. *Porter*, *supra*, n. 7.

dered," and it is not a "variable quantity" (*Benedict* v. *United States,* 176 U. S. 357, 360; see also Webster's New International Dictionary, 2nd Edition, unabridged (1946)). A "fee" is "compensation, often a fixed charge, for professional services or for special and requested exercises of talent or of skill, as by an artist." (Webster's New International Dictionary, 2nd Edition, unabridged (1946)). The Administrator, in using these terms in his regulations, intended them to have their generally accepted meaning, and he has so construed them in the official interpretation of his regulations.[9] This interpretation is "of controlling weight unless it is plainly erroneous or inconsistent with the regulations." (*Bowles* v.

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[9] See "Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition" (adopted by the Administrator as his official interpretation of the regulations) Wage-Hour Manual (1949) 20:101, 20:109.

On August 24, 1944, the Administrator restated his position with respect to "salaried employees." as follows (Release A–9, 3 CCH Par. 25,219.043): "An employee will be considered to be paid on a 'salary basis' within the meaning of sections 541.1, 541.2, or 541.3 of Regulations, Part 541, if under his employment agreement he regularly receives each pay period, on a weekly, biweekly, semimonthly, monthly or annual basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to variations in the number of hours worked or in the quantity or quality of the work performed during the pay period." Thus, employment on an hourly basis has been held not to satisfy the salary requirements of the Administrator's definition. *Walling* v. *Morris*, 155 F. (2d) 832 (C. A. 6), (reversed on other grounds, 332 U. S. 422); *Gorchakoff* v. *Calif. Shipbuilding Corp.*, 63 F. Supp. 309 (S. D. Calif.); *Chepard* v. *May*, 71 F. Supp. 389 (S. D. N. Y.).

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Seminole Rock and Sand Co., 325 U. S. 410, 414).[10] Though the Administrator has recognized that a guarantee of $30 a week in the case of an executive, or $200 per month in case of an employee employed in a bona fide administrative capacity will satisfy the salary requirement even if additional compensation may be earned on some other and variable basis,[11] the only guarantee in this case, that "The cook is not subject to any actual loss in her operation of the cookhouse" (fdg. 13, R. 13) plainly fails to measure up to this requirement.

Appellee's cook also fails to satisfy at least two other essential requirements of the "executive" regulations—i. e., she does not regularly and customarily direct the work of other employees and she does not customarily and regularly exercise discretionary powers. The lower court found that at any one time the cook had only one helper (fdg. 6, R. 11). The regulations, however, require an "executive" employee regularly and customarily to direct the work

[10] See also *Armstrong Co.* v. *Walling*, 161 F. (2d) 515, 517 (C. A. 1); *Walling* v. *Brooklyn Braid Co.*, 152 F. (2d) 938, 940 (C. A. 2); *Walling* v. *Cohen*, 140 F. (2d) 453, 456 (C. A. 3). The Administrator's interpretation of his own regulations stand on an even more authoritative footing than interpretations of sections of the Act which give no special regulatory power, but which are issued by the Administrator as "a practical guide to employers and employees as to how the office representing the public interest in * * * enforcement [of the law] will seek to apply it." *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 138. cf. *Roland Electrical Co.* v. *Walling*, 326 U. S. 657, 676.

[11] Ruling reported in 3 CCH Labor Law Rep. Par. 25,210.123 (1948) and noted in *Bender* v. *Crucible Steel Co.*, 170 F. (2d) 691, fn. 1 (C. A. 3).

of "other employees"—that is, more than one. The official interpretations of the Administrator indicate that "the plural form was used deliberately * * * because it was felt that an employee, to be a true 'executive' should direct the work of at least two other persons" (Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition, Wage Hour Manual (1949) 20: 92).

Further, there is no showing in the record that the cook "customarily and regularly exercises discretionary powers." The "finding" of the court below that her "duties require special aptitude and managerial skill" (fdg. 14, R. 13), even if it were sustained by the evidence, fails to measure up to this requirement. But in any event, the finding is "clearly erroneous" and should be set aside under Rule 52 (a) of the Federal Rules of Civil Procedure, in view of the uncontradicted evidence that the cook had no responsibility of management other than merely purchasing and cooking the food (R. 101) to produce plain meals (R. 90–91) which requires only the knowledge ordinarily acquired by a cook in a home kitchen (R. 110, 121, 177). As the lower court remarked during the trial, the meals consisted of "meat and potatoes in a logging camp and lots of dessert" (R. 127). Clearly the making of decisions with respect to such a "menu" does not constitute exercise of the "discretionary powers" (Sec. 541.1 (D) of the regulation) which are characteristic of a "true executive" as described in the Report and Recommendations of the Presiding Officer (Wage-Hour Manual (1949) (20: 92)).

Appellee's cook does not qualify any better for the "administrative" exemption. In addition to the fact that she does not meet the essential salary requirement, which in itself defeats the exemption, the evidence affirmatively shows that she does not meet any one of the three alternative requirements of the second portion of the administrative regulation.[12] *George Lawley & Son Corp.* v. *South,* 140 F. (2d) 439 (C. A. 1), certiorari denied 322 U. S. 746. Each of these alternatives require that the employee's duties be "non-manual" in nature. The exemption was intended only for "'white collar' employees" performing administrative functions (Report of the Presiding Officer, Wage-Hour Manual 20:105), and does not include those performing work of a "physical and manual character" (*Walling* v. *Morris,* 155 F. (2d) 832, 836 (C. A. 6)). The fact that the cook must, as her title implies, personally cook all of the food (the duties of her one assistant being confined to making toast, peeling potatoes, setting tables, carrying food to tables after it is dished up, doing the dining room work, and washing dishes (R. 121, 122)) clearly shows that this requirement is not met. Similarly, each of the three alternatives provide that the employee's duties "require the exercise of discretion and independent judgment." As previously pointed out with reference to "discretionary powers" under

[12] The fourth alternative is not discussed because its restriction to persons "transporting goods or passengers for hire" makes it plainly inapplicable.

the "executive" definition, there is no evidence to support the view that the cook in the instant case exercises "any important measure of discretion or independent judgement." See *Lassiter* v. *Guy F. Atkinson,* 162 F. (2d) at 778. Lastly, there is nothing in the record to indicate that the cook "regularly and directly assists an employee employed in a bona fide executive or administrative capacity," as required under the first alternative, or that her duties "directly related to management policies or general business operations," as required under the other two alternatives. On the contrary, the evidence that her duties were only with reference to the cookhouse (R. 101), affirmatively establishes that her work was not of such a nature. Thus, it is clear that her employment failed in every respect to satisfy the requirements prescribed in Section 541.2 (B) of the regulations defining "employee employed in a bona fide * * * administrative * * * capacity."

It should be noted that even if there were any basis for the ruling that the cook was exempt, the court's finding that appellee "has not kept the records of the cook required by the act and regulations" would suffice to require the issuance of an injunction. The regulations defining and delimiting the exemption require the keeping of certain records even with respect to exempt employees, inasmuch as such records are essential in order to determine whether the conditions of the exemption have been met.[13]

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[13] 29 Code of Federal Regulations, Part 516.7, 6 FR 4698. The pertinent provisions are printed in the Appendix, *infra*, pp. 31–32.

II

The cook's helper is an employee of appellee within the meaning of the Act

In concluding as a matter of law that the cook was an employee of appellee, the court below without giving any reasons simply stated "The helper is not" (concl. of law 2, R. 14). As the helper was engaged to perform a menial task for a fixed monthly wage (R. 139), there can be no question that she is an employee entitled to the protection of the Act. The only question that can be presented, therefore, is as to the identity of her employer—whether the responsibility rests upon appellee, who owns the cookhouse and the business and who permitted his cook to hire the helper, or whether this employee must look solely to the cook who herself is completely dependent upon appellee for her wages. Only on the theory that the cook is the helper's *sole* employer can it be concluded that appellee is relieved of obligation under the Act to keep the records with reference to her and see to it that she is compensated in compliance with the wage and hour provisions of the Act.

Since the court below found that the cook is appellee's employee, it is difficult to understand how it would not follow, *a fortiori,* that appellee is also the employer of the helper hired by the cook with appellee's acquiescence if not actually upon his direction. Plainly, the cook in hiring the helper was acting "directly * * * in the interest of" her employer within the literal terms of Section 3 (d) of the Act defining "employer."[14] Also the purpose of

[14] The pertinent portion of Section 3 (d) provides that "'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee * * *."

the statutory definition "seems obviously to render employers responsible * * * for acts of any person performed in their interests." See *Packard Motor Car Co.* v. *National Labor Relations Board,* 330 U. S. 485, 489.

The Supreme Court's decision in *McComb* v. *Rutherford Food Corp.,* 331 U. S. 722, involving employment relationships closely analogous to those in the instant case, conclusively establishes that appellee is responsible under the Act as employer of the cook's helper. In the *Rutherford* case, a slaughter house operator engaged meat boners who were designated independent contractors under written contracts which provided that they should hire, compensate, supervise and control other boners as their own employees and perform the boning operations in the slaughter house as independent contractors. In a unanimous opinion, the Supreme Court held that the assistants, as well as the "contractor" boners who hired them, were employees of the slaughterhouse operator within the meaning of the Fair Labor Standards Act. In that case, as presumably in the instant case, the agreement between the owner and the intermediary (the "contractor," who corresponds to the cook in the instant case) provided that the intermediary, and not the operator, was to employ, compensate and "have complete control over" assistants "who would be his [the contractor's] employees." 331 U. S. at 724–725. In that case, as in the instant case, there was no direct contractual relation between the owner and the assistants hired by the intermediary, and the owner "never attempted to control the

hours of the boners "except generally to require that they "keep the work current," the hours depending in large measure upon the work of the other workers employed by the owner. *Id.* at 726. There, as here, the compensation of the assistants was fixed and paid by the intermediary.

The chief argument advanced to support the contention in *Rutherford* that the assistant boners were not the employees of the operator of the establishment was that the absence of any express or implied contractual obligation on the part of the owner to pay the compensation of the assistant boners relieved the owner of responsibility as their employer (relying upon certain language in the Supreme Court's earlier decision in *Walling* v. *Portland Terminal Co.,* 330 U. S. 148, 152). The Supreme Court rejected this argument pointing out that it had previously recognized red caps to be employees of the railroad company although their compensation was derived solely from passengers' tips. *Id.* at 729. See *Williams* v. *Jacksonville Terminal Co.,* 315 U. S. 386; *Southern Railway Co.* v. *Black,* 127 F. (2d) 280 (C. A. 4); *Jones* v. *Goodson,* 121 F. (2d) 176 (C. A. 10). As the Court of Appeals for the Fourth Circuit said in response to a similar argument made in *Southern Railway Co.* v. *Black, supra*: "The determinative factor is not the source of their compensation * * *. We are not impressed with the argument that the companies can escape the payment of minimum wages to them [red caps] simply by providing that they shall look for compensation to tips from persons whom they assist." 127 F. (2d) at 281–282.

The determination of whether there is an employment relationship subject to the Act, the Supreme Court concluded in the *Rutherford* case, depends not upon any such "isolated factors" or upon any "label" used to describe the relationship (331 U. S. at 729), but "upon the circumstances of the whole activity" (*id.* at 730) considered in the light of the statutory purposes (*id.* at 727) and the Act's "own definitions, comprehensive enough to require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category" (*id.* at 729). The Court further pointed out that "The definition of 'employ' is broad" and "evidently derives from the child labor statutes and it should be noted that this definition applies to the child labor provisions of this Act, § 12" (*id.* at 728).

This reference to the child labor statutes is of particular significance in the instant case, since those definitions had been construed to apply to virtually the same relationship as existed here between appellee and the cook's assistant. Thus, in *Chattanooga Implement & Mfg. Co.* v. *Harland,* 146 Tenn. 85, 239 S. W. 421 (1922), an operator of a mill was sued for injuries sustained by a minor under a statute making it unlawful "to employ, permit, or suffer" any child less than 14 years of age to work in any mill, factory, or workshop. The defendant had never entered into an employment relationship with the minor in the usual sense, but certain of defendant's regular employees had permitted the boy to help them and had

paid him out of their own piece-rate wages. The court held defendant liable. *Curtis & Gartside Co.* v. *Pigg,* 39 Okla. 31, 134 Pac. 1125 (1913), similarly involved a statute making it illegal for children to be "employed, permitted, or suffered" to work in certain operations. The minor had assisted in the prohibited hazardous occupations at the request of a fellow employee whose instructions he had been told to follow. "The inhibition is just as strong and positive," the court said, "against permitting or even suffering a child of this age to do such things as it is against employing him to do them. * * * If the statute went no farther than to prohibit employment, then it could be easily evaded by the claim that * * * he was not employed to do such work, nor was permission given him to do so. But the statute goes farther * * *. It means that he shall not *employ* by contract, nor shall he *permit* by acquiescence, nor *suffer* by a failure to hinder." [Italics the court's.] [15]

Appellee in the instant case does not merely acquiesce in the employment of the cook's helper, or negatively suffer and permit her to work on his premises, but furnishes her lodging which is part of her wage (fdg. 4, R. 10, 139), and, on occasion, hired and paid the kitchen helper and withheld income taxes from the wages it paid her (fdg. 15, R. 13), as well as

[15] See also *Purtell* v. *Philadelphia & Reading Coal & Iron Co.*, 256 Ill. 110, 99 N. E. 899 (1912); *People ex rel. Price* v. *Sheffield Farms-Slawson-Decker Co.*, 225 N. Y. 25, 121 N. E. 474 (1918); *Commonwealth* v. *Hong.*, 261 Mass. 226, 158 N. E. 759 (1927); *Buffalo Steel Co.* v. *Aetna Life Ins. Co.*, 136 N. Y. Supp. 977, 983 (1915); *Graham* v. *Goodwin*, 170 Miss. 896, 156 So. 513, 514 (1934).

furnished and maintained the place and equipment used by her in her work (fdg. 4, R. 10).

As the Supreme Court recognized in the *Rutherford* opinion, the definition of the child labor statutes appears to have been adopted in the Fair Labor Standards Act deliberately and advisedly. Senator (now Mr. Justice) Black referred to the definition as "the broadest definition that has ever been included in any one Act" 81 Cong. Rec. 7657 (1937). This language thus must have been chosen deliberately to protect the basic labor standards from breaking down through just such shifting of responsibility as is attempted in this case. As stated by Judge Cardozo in *People ex rel. Price* v. *Sheffield Farms-Slawson-Decker Co.,* 225 N. Y. 25, 29, 121 N. E. 474, 476 (1918), under the terms of such statutory definitions, the employer "must neither create nor suffer in his business the prohibited conditions. The command is addressed to him. Since the duty is his, he may not escape it by delegating it to others. * * * He breaks the command of the statute if he employs the child himself. He breaks it equally if the child is employed by agents to whom he has delegated 'his own power to prevent.' " It "misses the whole point of such statutes," as Judge Learned Hand pointed out in a comparable situation, if employees "are to have recourse as an employer only to one of their own, without financial responsibility or control of any capital" and who "is himself as dependent upon the conditions of his employment as the company fixes them as are his helpers." (*Lehigh Valley Coal Co.* v. *Yensavage,* 218 Fed. 547, 552–553 (C. A. 2)).

The applicability of these observations to the Fair Labor Standards Act has been recognized not only by the Supreme Court in the *Rutherford* case, but by many of the circuit courts of appeals in circumstances similar to the instant case. The *Rutherford* case establishes that in such circumstances an employer cannot escape responsibility under the Act by interposing an intermediary to whom the authority to hire and fire and pay wages is delegated. In *McComb* v. *Western Union Telegraph Co.,* 165 F. (2d) 65 (C. A. 6), certiorari denied 333 U. S. 862, the company evolved a plan for converting its offices located in small towns into so-called agency offices under the control and operation of an "agent" who was ostensibly an independent contractor with authority to hire, fire, compensate, and supervise the workers in the agency office. The Sixth Circuit, holding that the personnel under their supervision, as well as the agents, were employees of the company, stated that "if one does suffer or permit another to work under circumstances where an obligation to pay will be implied, they are employer and employee under the act" 165 F. (2d) at 70. Similarly, in *Walling* v. *American Needlecrafts Co.,* 139 F. (2d) 60, homeworkers were held by the Sixth Circuit to be employees of the company even though another homeworker in some instances distributed and collected the work and the company neither paid directly nor even knew which workers were performing work for it (139 F. (2d) 62).

The Eighth Circuit reached a like conclusion in *McComb* v. *McKay,* 164 F. (2d) 40 (C. A. 8). Rely-

ing primarily on the *Rutherford* decision, the court held that a railroad company was the employer of personnel hired, fired, and paid by persons (McKay brothers) who enjoyed a considerably more independent status than appellee's cook. The McKays operated, essentially for the benefit of a railroad company, an establishment for the manufacture, repair, and storage of temporary grain and coal doors for freight cars. In supervising the yard's operation, they hired, fired, and paid the workers supervised by them, kept employment records, rendered bills to the railroad company for work performed at unit prices fixed by the railroad, and even made some investment in equipment. Although the arrangement contained "some possibility of gain or loss" to the McKays, the court emphasized that "unless the railroad fixes unit prices sufficient to cover production costs and some compensation for the McKays, the work * * * [would] cease." 164 F. (2d) at 49. Accordingly, it was the court's view that both the McKays and their workers were employees of the railroad company, upon which "from a practical standpoint [they were] completely dependent * * * for both work and pay" *id.* at p. 40.

See also to the same effect the decision of the Fifth Circuit with respect to the application of the Social Security Act. *Fahs* v. *Tree-Gold Co-op Growers of Florida,* 166 F. (2d) 40 (C. A. 5). Defendant, engaged in producing, harvesting, packing and marketing citrus fruits, engaged "contractors" in connection

with its packing house operations at a stipulated rate per box. The contractor in turn hired others to perform the work. There was little supervision, and no control by defendant, over the number of employees or their wages and hours. Relying upon the criteria of employment in the *Rutherford* case, as well as the *Hearst, Silk* and *Bartels* cases,[16] the court held that the Act "is not limited to those whose services are subject to the direction and control of their employer, but rather to those who, as a matter of economic reality, are dependent upon the business to which they render service. * * * However the facts are weighed, they will not support a conclusion that the persons in question were not, as a matter of economic reality, dependent upon the taxpayer's business as their means of livelihood" 166 F. (2d) at 44.

The helper in this case is as fully dependent upon appellee for both work and pay as were the employees in all of the above cases. This dependency, we submit, is of controlling significance, for "in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service" *Bartels* v. *Birmingham,* 332 U. S. 126, 130.

CONCLUSION

The rulings of the court below that the cook is exempt as an "executive" and "administrative" em-

[16] *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111; *United States* v. *Silk*, 331 U. S. 704; *Bartels* v. *Birmingham*, 332 U. S. 126.

ployee, and the cook's helper is not appellee's employee, are erroneous and should be reversed.

Respectfully submitted.

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APPENDIX

29 C. F. R. Cum. Supp. Sec. 541.1 and 541.2 (7 F. R. 332) provides as follows:

Section 541.1.—Executive.

The term "employee employed in a bona fide executive * * * capacity" in section 13 (a) (1) of the act shall mean any employee—

"(A) whose primary duty consists of the management of the establishment in which he is employed or of a customarily recognized department or subdivision thereof, and

(B) who customarily and regularly directs the work of other employees therein, and

(C) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight, and

(D) who customarily and regularly exercises discretionary powers, and

(E) who is compensated for his services on a salary basis of not less than $30 per week (exclusive of board, lodging, or other facilities), and

(F) whose hours of work of the same nature as that performed by nonexempt employees do not exceed 20 percent of the number of hours worked in the workweek by the nonexempt employees under his direction; provided that this subsection (F) shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch or establishment.

Section 541.2.—Administrative.

The term "employee employed in a bona fide * * * administrative * * * capacity" in section 13 (a) (1) of the act shall mean any employee—

(A) who is compensated for his services on a salary or fee basis at a rate of not less than $200 per month (exclusive of board, lodging, or other facilities), and

(B) (1) who regularly and directly assists an employee employed in a bona fide executive or administrative capacity (as such terms are defined in these regulations), where such assistance is nonmanual in nature and requires the exercise of discretion and independent judgment; or

(2) who performs under only general supervision, responsible nonmanual office or field work, directly related to management policies or general business operations, along specialized or technical lines requiring special training, experience, or knowledge, and which requires the exercise of discretion and independent judgment; or

(3) whose work involves the execution under only general supervision of special nonmanual assignments and tasks directly related to management policies or general business operations involving the exercise of discretion and independent judgment; or

(4) who is engaged in transporting goods or passengers for hire and who performs, under only general supervision, responsible outside work of a specialized or technical nature requiring special training, experience, or knowledge, and whose duties require the exercise of discretion and independent judgment.

* * * * *

29 C. F. R. Sec. 516.7 (6 FR 4698) provides as follows:

(a) *Items Required.*—Every employer shall maintain and preserve pay roll or other records

containing the following information and data on each and every employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman as defined in Part 541, *Regulations defining and delimiting the terms "Any Employee Employed in a Bona Fide Executive, Administrative, Professional, or Local Retailing Capacity or in the Capacity of Outside Salesman;"*

(1) Name in full,
    (And on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or pay roll records)
(2) Home address,
(3) Date of birth if under 19,
(4) Occupation in which employed,
(5) Time of day and name of the day on which the employee's workweek begins,
(6) Basis on which wages are paid,
(7) Total wages paid each pay period,
(8) Date of payment and pay period covered by payment.

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